82-179

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

NO. 82 -

Office - Supreme Court, U.S.
FILED
JUL 17 1982
ALEXANDER L. STEVAS,
CLERK

FRANK JOSEPH SACCHINELLI

Petitioner

v.

STATE OF GEORGIA

Respondent

PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES

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IN THE SUPREME COURT
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UNITED STATES

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NO. 82 -

QUESTIONS PRESENTED

I.

Whether police may use both lawful and unlawful methods in their investigations under an "any evidence" theory.

II.

Whether the Georgia Courts below erred when they denied Petitioner's Motion to Suppress evidence unlawfully obtained pursuant to an electronic surveillance warrant which was procured through a blatantly invalid affidavit.

III.

Whether the Indictment herein should have been dismissed due to the flagrantly unlawful investigative techniques of the Cobb County Georgia District Attorney's Office and Police Department.

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IN THE SUPREME COURT
OF THE UNITED STATES

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FRANK JOSEPH SACCHINELLI, Petitioner,	)	
v.	)	CASE NO. 82 - _____
STATE OF GEORGIA, Respondent.	)	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals and the Supreme Court of the State of Georgia which judgment was finally entered on May 18, 1982.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the State of Georgia is reported at 161 Ga. App. 763 and is set out in Appendix A attached hereto. Petitioner moved the Court of Appeals for the State of Georgia for a rehearing on that appeal. See, the aforesaid opinion attached hereto as Appendix "A". Petitioner then applied for Certiorari to the Supreme Court of the State of Georgia. The Supreme Court of the State of Georgia, with one justice dissenting, denied that Application for Certiorari. Said denial is set out in the Exhibit Appendix filed herewith. Petitioner finally moved the Supreme Court of the State of Georgia for a rehearing on the Application for Certiorari. On May 18, 1982, the Supreme Court for the State of Georgia denied that Motion for Rehearing on the Application for Certiorari with one justice dissenting. That denial is set out in the Exhibit Appendix filed herwith.

JURISDICTION

The Georgia Supreme Court of the State of Georgia, the court of last resort in said state, rendered a final decision in this matter on May 18, 1982.

Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3). Petitioner having asserted below and now asserts in this Court the deprivation of rights secured by the Constitutions of the United States and the State of Georgia.

QUESTIONS PRESENTED

I.

Whether police may use both lawful and unlawful methods in their investigations under an "any evidence" theory.

II.

Whether the Georgia Courts below erred when they denied Petitioner's Motion to Suppress evidence unlawfully obtained pursuant to an electronic surveillance warrant which was procured through a blatantly invalid affidavit.

III.

Whether the Indictment herein should have been dismissed due to the flagrantly unlawful investigative techniques of the Cobb County Georgia District Attorney's office and Police Department.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the following sections of the Georgia Constitution:

Article I, Section I, Paragraph I (Ga. Code Ann. § 2-101).

> "No person shall be deprived of life, liberty or property except by due process of law."

Article I, Section I, Paragraph X (Ga. Code Ann. § 2-110).

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched and the persons or things to be seized."

This case also involves the following statutory provisions of the State of Georgia:

Ga. Code Ann. § 27-313 Motion to Suppress evidence illegally seized.

> "(a) A Defendant aggrieved by an unlawful search and seizure may move the

Court for the return of property, the possession of which is not otherwise unlawful and to suppress as evidence anything so obtained on the grounds that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The Judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion, and the burden of proving that the search and seizure were unlawful shall be upon the State. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant in any trial.

(c) The motion shall be made only before a Court with jurisdiction to try the offense. If a criminal accusation is filed, or if an Indictment or special presentment is returned by a Grand Jury, the motion shall be made only before the Court in which said accusation, Indictment or special presentment, is filed and pending."

STATEMENT OF THE CASE

On May 6, 1980, Appellant and WALTER ARTHUR PARKER, were arrested by agents from the Cobb County and Bartow County Georgia Police Departments, from the Georgia Bureau of Investigation and from United States Customs upon landing at the Bartow County, Georgia airport. The items seized at the end of the runway to the airport included 995 pounds of marijuana. Among items seized inside the airplane were less than an ounce of marijuana.

During the August 1980 term, the Grand Jury of Bartow County, Georgia indicted the Petitioner along with WALTER ARTHUR PARKER for Possession with Intent to Distribute Marijuana, a Controlled Substance in Violation of the Georgia Controlled Substance Act.

Pre-trial Motions to Suppress the physical evidence obtained the night of the arrest were filed in the case. In essence, the pre-trial motions dealt with the use by the Cobb County Georgia District Attorney's office and Police Department of subpoenas which were procured and utilised without the knowledge or supervision of the Cobb County Georgia Superior Court. Petitioner's position was, and still

is, that the information obtained from him through these fraudulent subpoenas tainted Petitioner's arrest and subsequent Indictment. Petitioner also filed a motion requesting suppression of evidence obtained from an electronic surveillance.

The Honorable Tom Pope, Judge of the Superior Court of Bartow County, State of Georgia, denied Petitioner's Motion to Suppress both as to the unlawful subpoena and as to the electronic surveillance.

On December 2, 1980, Petitioner, along with WALTER ARTHUR PARKER, were brought to trial in Cartersville, Georgia. On December 4, 1980, the jury brought back verdicts of guilty as to both Appellant and Mr. Parker. The Petitioner was immediately incarcerated and his request for an appeal bond was denied.

On December 15, 1980, the Court sentenced Appellant, a first offender, to 10 years in the Georgia State penal system, 9 years to serve, 1 year probated and a $10,000.00 fine.

Appellant timely filed his Notice of Appeal and the case was brought properly before the Court of Appeals below. That appeal insofar as this Application for Writ of Certiorari is concerned resulted

from the Trial Court's denial of Petitioner's Motion to Suppress all the evidence seized on the night of his arrest and to dismiss the case against him. The basis of these motions were certain alleged illegalities in the course of the investigation which led law enforcement agents to the Bartow County, Georgia airport. Petitioner contended that Cobb County, Georgia authorities used sham subpoenas to seize messages taken for Petitioner by a telephone message service with which he had contracted. The information garnered from these illegally seized messages was then used along with deliberately false statements to obtain an electronic surveillance warrant (wiretap). The information from that wiretap then resulted in Petitioner's arrest and conviction.

After hearing argument on the matter by Petitioner only, the Court of Appeals concluded as follows:

> "Our review of the record reveals that Appellant's objection to the investigatory methods of the Cobb County Police are apparently well founded. It appears that the Cobb County Police used subpoenas issued in false names and contained language which appears likely to intimidate witnesses into remaining silent about the receipt of such subpoenas. It further appears from the record that some of the statements in the affidavit submitted in support of the request for a wiretap warrant were false. Whether they were deliberately false is not so clear."

Despite these findings, the Court of Appeals finally determined as follows:

> "However, the misconduct of the Cobb County Police and the apparent involvement of the Cobb County District Attorney in that misconduct, though reprehensible, do not require a reversal of Appellant's convictions. The reason for our decision is the same articulated by the Trial Judge, there is sufficient evidence to warrant a conclusion that the arrest of the Appellant and the seizure of the contraband stemmed from independent sources and was not tainted by the dubious methods of the Cobb County authorities. (case citation omitted) Although there is evidence to support Appellants' argument that their arrest stemmed directly from the information gained through an abuse of the subpoena power and by a wiretap based on allegedly false swearing, there is also sufficient evidence from which the Trial Judge could conclude, as the Trial Judge in this case did conclude, that there were separate and untainted sources of information which could and did lead the police to Appellants. In the Motion to Suppress the Trial Court is the finder of fact and its findings will not be disturbed unless clearly erroneous. McDonald v. State, 156 Ga. 143, 146 (1) (273 S.E.2d 881). We conclude, therefore, that since there was no evidence from which the Trial Court could find that the arrest of Appellant was not tainted by the alleged policemen's misconduct. There was no error in the denial of Appellant's Motion to Suppress the evidence seized at the Bartow County airport. For the same reason we find no error in the Trial Court's refusal to dismiss the Indictment for governmental misconduct."

Within the time provided by law Petitioner filed a Motion for Rehearing in the Court of Appeals of Georgia.

The Motion for Rehearing was denied by the Court of Appeals on March 23, 1982. In denying said Motion the Court of Appeals made no changes in its opinion. Thereafter, Petitioner timely applied to the Supreme Court of Georgia for Certiorari. The Supreme Court of Georgia denied Petitioner's Application for Certiorari on April 21, 1982 with one dissent. Petitioner then timely filed a Motion for Rehearing with the Supreme Court of the State of Georgia. That Motion for Rehearing was denied on May 18, 1982, again with one dissent. Petitioner now timely brings this Application from that final decision of the Supreme Court of the State of Georgia, the appellate court of last resort in said state.

The citations herein refer to the pre-trial motion hearing which are cited as MT with the volume and page number following in the record. The pertinent pages are attached hereto in Appendix "B" with the appropriate volume and page number set out thereon. References to exhibits and the decisions of the Georgia Supreme Court are set out in a separate appendix filed herewith.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

In the course of the pre-trial hearings, Appellant was able to show that the Cobb County Georgia District Attorney's office, in conjunction with the Public Safety Director of Cobb County, Georgia, had developed a procedure whereby they would obtain information about citizens of Cobb County, Georgia, including Appellant, by using subpoenas that were neither issued nor supervised by the Superior Court of Cobb County, Georgia. These subpoenas obtained in blank from the Superior Court of Cobb County, Georgia were filled in by the District Attorney's office or by the Police Department with a fictitious case name and were entitled "State of Georgia v. Ike Smathers". Additionally, the top law enforcement officials in Cobb County sanctioned that language included in the body of the subpoenas ordering citizens to come to Court for a hearing that was never scheduled by a Judge. The hearing date was merely "made-up". Under the direction of the District Attorney of Cobb County, additional language was placed in the subpoenas threatening criminal prosecution if the contents of the subpoenas were

disclosed to anyone other than the police for a period of 90 days. The use of these fictitious "Ike Smathers" subpoenas was wide spread in Cobb County, Georgia. In the case of the Petitioner, the District Attorney's office used the subpoena to obtain information from Petitioner's answering service. Information obtained through the "Ike Smathers" subpoena and subsequent wiretap led to Appellant's arrest. These "Ike Smathers" subpoenas were, in essence, general warrants and as such clearly violative of the Fourth Amendment to the United States Constitution, Article I, Section I, Paragraph X (Ga. Code Ann. § 2-110) of the Georgia Constitution and Georgia case law which states that "general warrants . . . are absolutely void, and will afford no protection to any officer or party engaged in their execution, when called upon to answer for an invasion of personal rights." In Re Lester Mayor, 77 Ga. 143, 148 (1886).

The police misconduct involved in the investigation of Appellant did not stop with Appellant's arrest. On May 30, 1980, 24 days after Appellant's arrest, another subpoena similar to the earlier "Ike Smathers" subpoena was served on Appel-

lant's answering service requesting additional messages and phone numbers of Appellant. That subpoena is found in Exhibit Appendix p. 80. Ms. Bryan, the owner of Northwest Answering Service, testified that she refused to comply with the subpoena and asked to call her lawyer (MT Vol. II, p. 606). Officer Phillips of Cobb County and Officer Padgett of the Georgia Bureau of Investigation tried in vain to persuade her not to do so (MT Vol. II, p. 606). However, this time Ms. Bryan persisted and called her lawyer, Mr. Larry Custer (MT Vol. II, p. 606). Mr. Custer went to the Cobb County Superior Court at the time and day mentioned in the subpoena (MT Vol. 2, p. 559). He found that the hearing indicated in the subpoena was not scheduled by the Clerk or by a Judge. He then went to the District Attorney's office and when he confronted an Assistant District Attorney with the subpoena he was met with only a smile and a shrug (MT Vol. 2, p. 561).

For a period of 40 days Cobb County Police eavesdropped on Appellant's phone conversations. The wiretap was procured by a submission to the Superior Court of Cobb County, Georgia of an affidavit containing misstatements of material fact. Furthermore, the affidavit contained information gathered

from the use of the "Ike Smathers" subpoena. The information gathered by law enforcement as a result of the wiretap was "tainted" and subject to suppression by the Trial Judge.

The conduct of the law enforcement officials violated Appellant's Fourth Amendment constitutional rights, his Fifth Amendment constitiutional right to due process and Article I, Paragraph I, Section I (Ga. Code Ann. § 2-101) and Article I, Section I, Pargraph X of the Georgia Constitution as well as committing a fraud upon the judicial system. Information leads developed from both the fictitious subpoena and unlawful wiretap resulted in Appellant's arrest. The Trial Court erred when it did not suppress all evidence obtained as a result of the "Ike Smathers" subpoena and the wiretap. Furthermore, the Trial Court erred in not exercising its discretion to dismiss the Indictment based on outrageous government conduct.

The District Attorney and Public Safety Director of Cobb County, Georgia, committed a fraud upon the Court and upon the citizens of the state by utilising investigative techniques which directly violated the Constitutions of the United States and the State of Georgia. They corrupted the trust placed in them and

and acted in a brazen disregard of their oaths of office. Appellant's rights were violated deliberately, wantonly and maliciously. This conviction warrants the considered and review of this Court and a reversal.

REASONS FOR GRANTING THE WRIT

I. This Court should grant Certiorari to decide the issue whether police may use both lawful and unlawful methods in their investigations under an "any evidence" theory.

On September 27, 1979, Sergeant Sisson, a Cobb County Police Officer, served Sharon Bryan, the owner of Northwest Answering Service, with a subpoena entitled "State of Georgia v. Ike Smathers." See Exhibit Appendix p. 78. Sergeant Sisson obtained the "Ike Smathers" subpoena from the Cobb County District Attorney's office (MT Vol. II, p. 519, 520 and 534). Sergeant Sisson served the subpoena

knowing that "Ike Smathers" did not exist (MT Vol. 2, p. 525). This "Ike Smathers" subpoena had no case number nor was it returnable to a Grand Jury. The subpoena compelled Ms. Bryan to furnish any and all records pertaining to the following people: (1) Frank Sacchinelli; (2) Danny Benson; and (3) Steve Musick. The subpoena stated there would be hearing at 9:30 a.m. on September 27, 1979, to compel the production of documents requested, but "in lieu of your appearing in Court on the above date, this information may be released to Sgt. David Sisson of the Cobb County Police Department or his representative delivering this subpoena." (Exhibit Appendix p. 78).

Ms. Bryan testified in the Motion to Suppress hearing that she was served with a subpoena on September 27, 1979 at approximately 9:00 a.m. in the morning, one-half hour before the hearing was scheduled to begin. She gave Officer Sisson whatever he requested and whatever records she had concerning Appellant. (MT Vol. II, p. 582). Ms. Bryan further explained that Officer Sisson told her not to discuss this subpoena with anyone (MT Vol. II, p. 601) and that she gave the information to the police because she felt she didn't have any choice.

(MT Vol. II, p. 620). Ms. Bryan was told by Officer Sisson that if she discussed the subpoena with anyone for a period of 90 days, she would interfere with the enforcement of the law. (MT Vol. 2, p. 586). Officer Sisson took all the messages she had for Appellant's phone, as well as, looking through other messages from other customers and taking the account cards of many customers that had nothing to do with the persons named on the subpoena (MT Vol. II, p. 598 and 620).

Karen Conner, a detective with the Cobb County Police Department, testified that she prepared "Ike Smathers" subpoenas under the direction of the District Attorney (MT Vol. 2, p. 549-550). Detective Conner stated that the Cobb County Georgia Police Department, with the expression permission of the County's District Attorney, had been utilizing subpoenas entitled "State of Georgia v. Ike Smathers" as an "investigative" tool. (MT Vol. II, p. 550). The language in the subpoena instructing the recipient not to disclose the existence of the subpoena for 90 days or be guilty of interference with the law, was placed in the subpoena through instructions from the District Attorney (MT Vol. II, p. 550). The hearing date placed in the subpoena was picked out by Ms. Conner

without checking with the Court and was "made-up" (MT Vol. II, p. 552). After typing "Ike Smathers" subpoenas, Ms. Conner sent copies to the District Attorney (MT Vol. II, p. 553). This procedure was with the full knowledge of the Director of Public Safety for Cobb County, Georiga (MT Vol. II, p. 645). During the hearing on the Motion to Suppress, Cobb County police officers admitted serving "Ike Smathers" subpoenas on numerous occasions (MT Vol. II, p. 745). One of the many recipients of these subpoenas was Southern Bell. Mr. Gerald McDaniel, Director of Southern Bell Security, testified to receiving and complying with "Ike Smathers" subpoenas. (MT Vol. II, p. 764).

The Trial Court determined that the "Ike Smathers" subpoena was illegal, stating was follows:

> "I mean, you know, the Ike Smathers subpoena is illegal, you know. There is no question about it. It is issued, no doubt, people get in the habit, I guess, of the subpoena being issued in blank, and they have got a tool available to them and then they use that without -- for an invalid purpose." (MT Vol. III, p. 1473).

The information seized from the "Ike Smathers" subpoena was utilized by Officer Pierce to obtain electronic surveillance of Appellant's telephone conversations. Under traditional Fourth Amendment

principals and under Articles I, Section I, Paragraph X (Ga. Code Ann. § 2-110) of the Georgia Constitution. The arrest of Petitioner at the Bartow County, Georgia airport and the seizure of the items at the end of the runway and inside the plane, items which were later introduced at trial, relate back to the information unlawfully obtained from Petitioner's answering service. See Wong Sun v. United States, 371 U.S. 471 (1963). The discussion of this link between the "Ike Smathers" subpoena, the electronic surveillance and the Petitioner's arrest follow:

After Sergeant Sisson obtained Petitioner's messages from Northwest Answering Service, they were analyzed by the Special Investigation Section of the Cobb County Georgia Police Department (MT Vol. II, p. 529). The phone numbers were checked out with local law enforcement authorities, and any leads developed from the messages were pursued (MT Vol. II, p. 705). The Cobb County Police Department condensed the information into a case report (Exhibit Appendix p. 192-212). That report was then placed in Petitioner's Cobb County Georgia Police file for further review and study by Officer Pierce, the case agent. (MT Vol. II, p. 700, 701). Officer Pierce testified that after reviewing the case report, he con-

tinued to investigate Petitioner by looking over the messages and telephone calls in a continuing effort to gather information on Petitioner's activities (MT Vol. II, p. 702). Based on the information and messages, Pierce wrote to law enforcement agencies and inquired about the names to whom the telephone numbers were listed and whether those individuals had criminal records (MT Vol. II, p. 706). The information that the police seized from Northwest Answering Service was quite valuable. The Cobb County Police summarizing this information in the case report as follows:

> "On September 27, 1979, a subpoena was served to Sharon Bryan, Mgr. of the Northwest Answering Service, requesting the records that they had regarding three (3) subjects, Danny Benson (Danny Benson Aircraft Sales), Steve Musick and Frank Sacchinelli. These records in the form of messages taken by the line operators show that the aforementioned subjects were making frequent trips between Atlanta, Florida and New York. That these subjects used both commercial and private air services as their mode of travel. These subjects would keep in touch on a day to day basis. That these subjects are in contact with subjects in other countries that are noted for smuggling narcotics. They have established a pattern similar to other known smuggling operations." (emphasis added) (Exhibit Appendix p. 192).

In February 1980, Officer Pierce obtained authorization to eavesdrop on Petitioner's phone con-

versations. That authorisation was obtained pursuant to an affidavit prepared by Pierce and presented to the Superior Court of Cobb County, Georgia (Exhibit Appendix pp. 32-42). An examination of the affidavit shows that information seized from Northwest Answering Service was contained in the body of the affidavit. On page five of the affidavit, Pierce states that "numerous telephone calls have been made from (404) 435-2754 to (714) 494-3310 and (714) 497-2421, according to the records of the Southern Bell Telephone Company obtained through subpoena by affiant." Telephone number (714) 494-3310 was obtained by the police from the information seized at Northwest Answering Service. That information was contained in a message to Petitioner from "Sam" (Exhibit Appendix p. 208). Furthermore, even if some phone numbers were obtained by the police who subpoenaed Southern Bell, the subpoena was another unlawful "Ike Smathers" subpoena. Starting in January, 1980 and continuing through August 1, 1980, Officer Pierce utilizing a subpoena entitled "State of Georgia v. Ike Smathers" requested and received toll information from Southern Bell regarding Petitioner's phone (Exhibit Appendix pp. 117-171).

The pattern of Petitioner's activities first discovered from the use of "Ike Smathers" subpoena was utilized by Pierce as a part of his "probable cause" that Petitioner was engaged in unlawful conduct. Pierce's affidavit explains and delineates alleged contact between Petitioner and individuals who were suspected smugglers (Exhibit Appendix pp. 32-42). It is obvious from a review of Pierce's affidavit that they started with the framework of Petitioner's phone messages and further developed leads and information. Pierce admitted as much by stating that the information contained in his affidavit was all sources he had including responses he had from other police departments concerning subscriber information (MT Vol. II, p. 709).

The Bartow County airport is not mentioned in the messages obtained from Northwest Answering Service. The fact that Petitioner had access to an airplane based there and that he might have been planning a smuggling operation which involved that airport was determined from the electronic surveillance conducted on Petitioner's phone. The information obtained from the use of the "Ike Smathers" subpoena on Northwest Answering Service was utilized as part of Officer Pierce's affidavit to

obtain electronic surveillance. As a result of the wiretap on Petitioner's phone, law enforcement officers specifically located the Cessna airplane at the Bartow County, Georgia airport. Officer Pierce in his affidavit to the Court, seeking an extension of the wiretap, states as follows:

> "The electronic surveillance was further revealed that said importation will be accomplished through the use of aircraft and Frank Joseph Sacchinelli requested maintenance assistance on one Cessna 310 located at an airport in Bartow County, Georgia". (emphasis added) (Exhibit Appendix p. 54).

Petitioner established a clear link between the information obtained from Northwest Answering Service and the procurement of the wiretap warrant. The police utilized the information obtained from the warrant to locate Petitioner at the Bartow County, Georgia airport. They placed him under surveillance which resulted in his arrest. Had it not been for the "Ike Smathers" subpoena on Northwest Answering Service, the wiretap would not have commenced and had it not been for the wiretap, Petitioner's location at the Bartow County airport would not have been determined by law enforcement officers. The record is clear that the Petitioner's arrest was a "fruit" of unlawful activities by the police. The exclusionary

rule bars from trial physical tangible material obtained as a direct or indirect result of unlawful searches or seizures. Wong Sun v. United States, 371 U.S. 471, 484 (1963); Ga. Code Ann. § 27-313. The Trial Court erred in failing to suppress the evidence seized at the airport the night of Appellant's arrest.

Nonetheless the Court of Appeals for the State of Georgia affirmed the Trial Court stating as follows:

> "Our review of the record reveals Appellant's objection to the investigatory methods of the Cobb County Police are apparently well founded. It appears that the Cobb County Police used subpoenas issued in false names and containing language which appears likely to intimidate witnesses into remaining silent about the receipt of such subpoenas. It further appears from the record that some of the statements in the affidavits submitted in support of the request for a wiretap warrant were false. Whether they were deliberately false is not so clear. However, the misconduct of the Cobb County Police and the apparent involvement of the Cobb County District Attorney in that misconduct, though reprehensible, do not require a reversal of Appellant's convictions. The reason for our decision is the same articulated by the Trial Judge:
>
> "There is sufficient evidence to warrant a conclusion that the arrest of the Appellants and the seizure of the contraband stemmed from independent sources and was not tainted by the dubious methods of the Cobb County authorities. (case citation omitted). Although there is evidence to support Appellant's argument that their arrest stemmed directly from the information gained through an abuse of the subpoena power and by a wiretap based on allegedly false swearing, there is also sufficient evidence from which the Trial Judge could conclude, as the Trial Judge in this case did

conclude, that there were separate and untainted sources of information which could and did lead the police to Appellants. In a Motion to Suppress the Trial Court is the finder of fact and its findings will not be disturbed unless clearly erroneous. McDonald v. State, 156 Ga. App. 143, 146 (1) (273 S.E.2d 881). We conclude, therefore, that since there was evidence from which the Trial Court could find that the arrest of the Appellant was not tainted by the alleged policemen's conduct there was no error in the denial of Appellant's Motion to Suppress the evidence seized at the Bartow County airport. For the same reason, we find no error in the Trial Court's refusal to dismiss the Indictment for governmental misconduct."

The Supreme Court of Georgia affirmed the Court of Appeals of the State of Georgia when it denied Petitioner's Application for Certiorari with one justice dissenting.

Both courts, the Court of Appeals in the State of Georgia, directly, and the Supreme Court of Georgia, by implication, relied on McDonald v. State, 156 Ga. App. 143, 273 S.E.2d 881 (1980). That reliance is misplaced and the case is misapplied here. In the McDonald case, the Court of Appeals for the State of Georgia states in pertinent part:

" . . . we look to the totality of the circumstances, including but not limited to, information obtained by law enforcement agents conducting a common investigation.

. . .

On the Motion to Suppress evidence, the Trial Judge sits as trier of the facts, hears the evidence, and his findings based

on conflicting evidence are analogous to the verdict of a jury. It should not be disturbed by a reviewing court if there is any evidence to support it."

The problem here is that there is no conflict in the evidence. The Court of Appeals for the State of Georgia found that there is evidence to support Petitioner's argument that Petitioner's arrest stemmed directly from the information gained through an abuse of the subpoena power and by a wiretap based on false swearing. On the other hand, the Court of Appeals found that there is also sufficient evidence from which a Trial Judge could conclude that there were separate and untainted sources of information which could and did lead the police to Petitioner. Unfortunately the Court of Appeals in the State of Georgia does not present any facts to bolster this conclusion. The reason no facts are shown that under the totality of the circumstances here only scant, if any, evidence, shows that "there were separate and untainted sources of information which could and did lead to Appellant." In essence the overwhelming evidence clearly demonstrates that the unlawful investigatory techniques are what led officials to Petitioner.

However, even if the Court of Appeals' position is accepted which as previously shown goes against the totality of the circumstances here, the law of that case does not apply. Under the Court of Appeals determination then, either the lawful evidence, unlawful evidence or both may have led officials to Petitioner and to his arrest. In essence the Court of Appeals finds that there is a doubt in this regard. Such a case, no matter which position the Trial Court took either denying or granting the Motion to Suppress, it would have been affirmed under the Court of Appeals decision. The "any evidence" rule fails in such a case. The Court, be it Trial or Appellate Court, must go beyond that rule to look at the totality of the circumstances as they are directed to do by the McDonald case. See in this regard, Franks v. Delaware, 438 U.S. 154, 155 (1978). Otherwise, the Trial Court could, as Appellant contends here, base its decision on a scintilla of, if not a mere hope for, evidence even though the overwhelming weight, if not all the evidence, indicates quite the contrary.

As stated in the case cited by the Court of Appeals, the Judge sits as the trier of fact in a fashion analogous to the jury and in that regard must

consider the totality of the circumstances. Hence, more than just "any evidence" will be necessary to find that the arrest of Petitioner was not tainted by the alleged police misconduct particularly in an instance such as this case. To decide otherwise is to say that law enforcement officials can use both lawful and unlawful means to gather evidence. So long as the lawful means purportedly succeeds in gathering any evidence that leads to an individual that will be sufficient. The danger and message of that position are obvious, the Court in effect says:

> "Gentlemen, certainly your unlawful means are condemned and will be continued to be condemned. Still, all in all, they are really not so bad when used alongside lawful investigative means, so use both, just make sure the lawful means yields some evidence -- any evidence -- and this Court will uphold you."

The illogic of that position is painfully obvious particularly when it ultimately concerns each and every citizen's right to freedom and right to privacy.

The McDonald case cited by the Court does not take that position. The Georgia Courts of Appeal erred in this regard. The Supreme Court of the United States should therefore grant this Application for Certiorari and reverse the holding of the Georgia

courts below.

II. This Court should grant certiorari to consider whether the Georgia courts below erred when they denied Petitioner's Motion to Suppress Evidence unlawfully obtained pursuant to an electronic surveillance warrant which was procured through a blatantly invalid affidavit.

When the Cessna airplane arrived at the Bartow County, Georgia airport on May 6, 1980, officers of the Georgia Bureau of Investigation, Cobb County Police, Bartow County Sheriff's Office and United States Customs were lying in wait. Officer Phillips of the Cobb County Police stopped and detained Petitioner when the plane landed. Officer Phillips testified that he and other officers approached the airplane with guns drawn, shouting "Halt" (MT Vol. I, p. 244). The police officers immediately searched the airplane and seized items inside the plane including part of a gas pump, paper, charts, a piece of wood, marijuana residue and other miscellaneous items.

(MT Vol. I, pp. 250-251). This evidence was introduced by the State of Georgia at trial. Officer Phillips admitted seizing the evidence in the airplane before arresting Petitioner. (MT Vol. I, p. 251). Officer Phillips explained his conduct by stating they were expecting drugs. (MT Vol. I, p. 230). It was after Appellant was forcibly detained and the airplane searched that Officer Phillips was notified that bails of marijuana had been found at the end of the runway. (MT Vol. I, p. 221). Petitioner, through reference to the record, and the ruling of the Trial Judge has demonstrated the illegality of the "Ike Smathers" subpoenas. Petitioner has further shown that information obtained from his answering service was placed in the body of the affidavit of Officer Pierce, which resulted in electronic eavesdropping. The eavesdropping gave the police the location of the plane. (Exhibit Appendix p. 54).

Additionally, however, it is Petitioner's position that Pierce's affidavit was fatally defective in that it contained information known to be false. Those deficiencies totally unrelated to the "Ike Smathers" material in and of themselves are sufficient to void the Petitioner's arrest and suppress the physical evi-

dence obtained at the Bartow County airport. Franks v. Delaware, 438 U.S. 154 (1978) mandates that:

> "If, after evidentiary hearing, Defendant establishes by a preponderance of evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by a affiant in the search warrant affidavit, and, that affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id at 155.

During the Motion to Suppress hearing, William Riley, the former Senior Investigator of the Organized Crime and Public Corruption Prosecution Unit of the Dade County (Florida) State Attorney's Office testified both as a factual and expert witness. Mr. Riley was involved as a police officer in the investigation of Petitioner's activities when he ventured to the State of Florida in 1978. (MT Vol. III, p. 1397-1400). Mr. Riley testified, from personal knowledge, that information and facts contained in Pierce's affidavit were false. Pierce's affidavit states that Appellant, while in Miami, Florida, purchased cocaine on November 1, 1978 and made arrangements to do so again on November 2, 1978. (Exhibit Appendix p. 33). Mr. Riley, however, stated that he

was in charge of the investigation of Petitioner in the Miami area, and that Petitioner never purchased cocaine on November 1 nor made arrangements to purchase cocaine on November 2 (MT Vol. III, p. 1398). Mr. Riley had Petitioner under both physical and electronic surveillance on the dates mentioned in Pierce's affidavit, and explained that he would have arrested Petitioner had he engaged in any unlawful activities (MT Vol. III, pp. 1398-1400).

Pierce's affidavit claims information regarding Appellant's activities in the State of Florida was obtained from the "Florida Attorney General's Organized Crime Task Force" through "Assistant State Attorney Martin Dardis" (Exhibit Appendix p. 33). Mr. Riley testified that there was no such organization in the State of Florida and that Martin Dardis, who is both a personal friend and was a fellow police officer, was not, and has never been, an Assistant State Attorney (MT Vol. III, p. 1398). Mr. Riley's testimony unrefuted by the State pointed out additional misstatements of Officer Pierce. On page six of his affidavit (Exhibit Appendix p. 37), Pierce states:

> "Affiant further shows that on the 24th day of August, 1979, Sam Sarcinelli and Pamela Messina, along with another individual indicted by the Federal Grand Jury

on the charges of conspiracy and possession with intent to distribute approximately thirteen and two-tenths pounds of cocaine. The information related to affiant by members of the Drug Enforcement Administration in the month of September, 1979 and again in January, 1980."

Pierce's affidavit is dated February 26, 1980. On January 25, 1980, the United States Magistrate for the United States District Court, Southern District of Florida, granted Sarcinelli and Messina's Motion to Dismiss the Indictment or to Suppress the Evidence. On February 6, 1980, the United States District Judge for the Southern District of Florida incorporated the Magistrate's recommendation and suppressed the evidence against Sarcinelli and Messina (Exhibit Appendix pp. 514, 515). Therefore, when Pierce presented his affidavit to the Superior Court of Cobb County, Georgia, he failed to include the correct status of the case involving Sarcinelli and Messina. He failed to alert the Court that the prosecution of Sarcinelli and Messina was halted by the ruling of a United States District Judge, facts that clearly were relevant to the Court's determination of probable cause.

When this Court disregards the misstatements of facts contained in Pierce's affidavit, the affidavit is

stripped to mere conclusions and stale information, neither of which is sufficient to support probable cause.

The affidavit is replete with unsupported conclusions and warrantless presumptions. Many of these were shown through the unrebuted testimony of William Riley. Mr. Riley was qualified by the Court as an expert witness as to the law of electronic surveillance under the federal statute. (MT Vol. III, p. 1396). As the Georgia Electronic Surveillance Law complies with the minimum standards dictated by the federal law, Mr. Riley's opinion as to the deficiency as to Pierce's affidavit, under federal law, would also be valid as to the deficiency as to the affidavit under Georgia law. See Morrow v. State, 147 Ga. App. 395, 249 S.E.2d 110 (1978). Mr. Riley stated that in his opinion the affidavit, although mentioning many names and stating many dates, did not establish a pattern or a course of conduct involving Petitioner sufficient to substantiate probable cause (MT Vol. III, pp. 1430-1437). An example of Pierce's failure to show a connection between Petitioner and alleged unlawful activities is contained on page three of Pierce's affidavit. (Exhibit Appendix p. 34). Pierce concludes there is a relationship between Petitioner and John

Daniel Benson. That conclusion used as a basis for probable cause is determined solely on the allegation that Petitioner, in the year 1978, called a Forrest Roberts. Forrest Roberts, in the year 1979, was found not guilty of conspiracy to import marijuana. His Co-Defendant, John Daniel Benson, was found guilty. Pierce's conclusions linking Petitioner with John Daniel Benson, through Forrest Roberts, are pure speculation. The affidavit fails to describe, in any detail, any relationship between Petitioner and John Daniel Benson which amounts to suspicion of criminal conduct. The law is clear that rumours, innuendos or accusations based merely on general reputation do not furnish the basis for probable cause. Spinelli v. United States, 393 U.S. 410, 416 (1969); State v. Griffin, 154 Ga. App. 361, 268 S.E.2d 412 (1980).

Page four of Pierce's affidavit contains the most glaring example of the inadequacy of the information providing the foundation for Pierce's assertion of probable cause. (Exhibit Appendix p. 35). Pierce states that Appellant placed numerous calls to Ellis Aviation, a business located at the Carrolton, Georgia airport. Pierce did not state when the calls were made. Pierce recites that in the year 1976 a DC 3

aircraft landed at the Carrolton airport and that this aircraft was found to contain marijuana. There are absolutely no factual allegations connecting that airplane and that marijuana with Ellis Aviation or with Petitioner. Pierce, through an exercise of reasoning that defies a logical explanation, utilized that information as a basis for probable cause. Mr. Riley expressed his opinion that the language in Pierce's affidavit was a flagrant attempt to "flower-up" the affidavit. (MT Vol. III, p. 1433). This cannot properly form the foundation for probable cause. Spinelli op. cit.

Neither can stale information form the basis for a valid warrant. See E.G. Fowler v. State, 121 Ga. App. 22, 172 S.E.2d 447 (1970); State v. Boswell, 131 Ga.App. 657, 659 206 S.E.2d 682 (1974) in which the Court noted that "cases are unanimous in holding that intervals of two months or more between the act and the affidavit are impermissible." In his affidavit Pierce mentions the events that took place as much as four years before the preparation of the affidavit in February of 1980. The DC 3 plane landed in Carrollton, Georgia in 1976. Appellant called Forrest Roberts in the year 1978. Even if those events had any connection with the Appellant, and on the face of

the affidavit there is nothing to indicate this is the case, those events were far removed in time from that which is necessary to support a determination of probable cause. The information is stale.

When the statements found on pages 2, 3, 4, 5 and 6 of Pierce's affidavit are striken because of the infirmities noted above, the remaining statements are insufficient to establish probable cause. The statements on pages 1, 7, 8 and 9 of the affidavit do not set out facts showing specified crimes or a series of related patterns of criminal conduct such that a reasonable man would believe Appellant was using his phone in a criminal conspiracy. See and compare affidavit in United States v. Armocida, 515 F.2d 29 (3rd Cir. 1975), cert. denied 423 U.S. 858. Unlike the case of Dismuke v. State, 154 Ga. App. 188, 262 S.E.2d 490 (1979) there is nothing remaining in the affidavit except isolated statements having no connection to Petitioner's use of his phone.

III. This Court should grant certiorari to consider whether the Indictment herein should have been dismissed due to the flagrantly unlawful

investigative techniques of the Cobb County Georgia District Attorney's Office and Police Department.

In United State v. Russell, 411 U.S. 423 (1973), the Court recognized that:

> "We may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principals would absolutely bar the Government from invoking judicial process to obtain a conviction." Id at 431, 432.

Recently the Georgia Court of Appeals in reviewing the conduct of the District Attorney's Office of Cobb County, Georgia recognized that the remedy of dismissal may be proper under certain situations. Caudell v. State, 157 Ga. App. 415, 277 S.E.2d 773 (1981) In the case at bar the Trial Judge addressed the "Ike Smathers" subpoena as follows:

> "It is going to be difficult to fashion some type of remedy that will put an end to the Ike Smathers subpoenas situation that will pass on a message to them they have got to quit doing it." MT Vol. III, p. 1474.

This Court can send that message to law enforcement officials by reversing Appellant's conviction. This court which should not allow blatant

governmental misconduct to be condoned and rewarded by allowing illegally seized evidence and the fruits thereof to be used as evidence against an individual. As Justice Brandeis said in his famous dissenting opinion in Olmstead v. United States, 277 U.S. 438, 471-485 (1928):

> "Decency, security and liberty alike demand that government officials should be subjected to the same rules of conduct that are commands to the citizens. Our government is a potent, omni-present teacher for good or for ill. It teaches the whole people by its example. Crime is contagious. If the government invites every man to become a law unto himself, it invites anarchy. To declare that in the administration of the criminal law the end justifies the means, to declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution." Id at 45.

CONCLUSION

For any one or all of the aforesaid reasons, Petitioner prays that the Petition for Writ of Certiorari be granted to review the judgments and opinions of the Court of the State of Georgia below.

Respectfully submitted,

LAW OFFICES OF EDWIN MARGER

By: _____
Edwin Marger

By: _____
Robert O. Davies